REMARKS / ARGUMENTS

Applicants thank the Examiner for the consideration given the present application. Upon entry of the claim cancellations and amendments herein, Claims 1-6, 8-11, 13-15, 17-18 and 20 will be pending. Applicants have amended Claims 1, 8, 13 and 16. Claims 7, 12 and 19 have been cancelled.

In particular, Claim 1 has been amended to add "and wherein the composition further comprises from about 0.1% to about 10% total fructose, by weight of the composition." Support for this amendment is found in Claims 7 and 12 as originally filed.

Claims 8, 13 and 16 have been amended to modify their dependency.

Information Disclosure Statement

In the Final Office Action of February 24, 2003, the Examiner stated that the information disclosure statement filed by the Applicants on January 16, 2003, fails to comply with 37 C.F.R. § 1.98 (a)(3) because it does not include a concise explanation of the relevance, as it is presently understood by the individual designated in 37 C.F.R. § 1.56 (c) most knowledgeable about the content of the information, of each patent listed that is not in the English language. In response to the Examiner's foregoing assertions, Applicants apologize for this oversight and have herein enclosed English language translations, as well as a Supplemental IDS, for the aforementioned references cited in the information disclosure statement of January 16, 2003.

The Rejection under 35 U.S.C. § 112, second paragraph

The Examiner has rejected claims 1-20 under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to point out and distinctly claim the subject matter which Applicants regard as the invention. Specifically, the Examiner objects to the use of the term "about." Applicants respectfully traverse this rejection.

The descriptive term "about" does not generally render a claim indefinite. See *W.L. Gore & Assoc. v. Garlock, Inc.*, 721 F.2d 1540, 1557, 220 USPQ2d 303, 316 (Fed. Cir. 1983). The term "about" entitles the Applicant to a relatively broad interpretation of any range that it modifies that is claimed in the patent. See *Syntex (USA) Inc. v. Paragon Optical Inc.*, 7 USPQ2d 1001, 1038 (D. Ariz. 1987). "About" is not an arbitrary term, but rather, is a clear but flexible word with a meaning similar to "approximately." See *Ex parte Eastwood*, 163 USPQ 316, 317 (Pat. Off. Bd. App. 1968). As a matter of law, the term "about" is a "clear warning that exactitude is not claimed but rather a contemplated variation." *Kolene Corp. v. Motor City Metal Treating, Inc.*, 307 F. Supp. 1251, 1258, 163 USPQ 214, 220 (E.D. Mich. 1969).

In the present case, Applicants have used the term "about" in several claims. In the Final Office Action, the Examiner stated "defining one indefinite by other indefinite terms does

not provide the necessary clarity so as to inform the public as to the scope of Applicants' claims. Applicants respectfully assert that the meaning of the term "about," as used herein, would be clear to one of ordinary skill in the art for the aforementioned reasons, and thus, the use of the term does not render the claims of the present invention indefinite under 35 U.S.C. § 112, second paragraph. Therefore, Applicants respectfully disagree with the Examiner's assessment of the clarity of Applicants' claims and respectfully request the withdrawal of the rejection based on the use of the term "about."

The Rejection under 35 U.S.C. § 102

The Examiner has rejected Claims 1-7, 17, 18 and 20 under 35 U.S.C. § 102 as anticipated by Product Alert (v. 28, n.11). Applicants respectfully traverse this rejection.

The present invention is directed to food and beverage compositions that reduce the postprandial rise in blood glucose (described as low Glycemic Index) that synergistically acts to provide enhanced metabolism to the mammalian system and inhibit the storage of systemic fat. As an additional benefit, these low Glycemic Index compositions have surprisingly been found to enhance the perceived positive mood and energy in the consumer, without rapid depletions of blood glucose (i.e. mediation of blood glucose) while reducing the insulin response. Such mood and energy enhancements are significantly enhanced relative to compositions containing only green tea, or those that exhibit a high Glycemic Index.

Under 35 U.S.C. § 102, a claim is anticipated only if each and every claim is found, either expressly or inherently disclosed, in a single prior art reference. See *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631 (Fed. Cir. 1987). Although this disclosure requirement presupposes the knowledge of one skilled in the art of the claimed invention, that presumed knowledge does not grant a license to read into the prior art reference teachings that are not there. See *Motorola, Inc. v. Interdigital Tech. Corp.*, 121 F.3d 1461, 43 USPQ2d 1481, 1490 (Fed. Cir. 1997). Additionally, there must be no difference between what is claimed and what is disclosed in the applied reference. See *Scripps v. Genetech Inc.*, 18 USPQ2d 1001, 1010 (Fed. Cir. 1991). Moreover, it is incumbant on the Examiner to identify wherein each and every facet of the claimed invention is disclosed in the applied reference. *Ex parte Levy*, 17 USPQ2d 1461, 1462 (BPAI 1990).

As aforementioned, the Examiner has based the present rejection on Product Alert (v. 28, n. 11), which discusses Cinagro Energy Plus Healthy Whole Body Tonic (herein "Cinagro product"). The Product Alert arguably teaches a beverage composition containing juices, green tea, several B vitamins and agave nectar. However, the rejection fails to identify exactly where in the Product Alert each and every element of the present claims is shown, as is required. For instance, in contrast to the present invention, which claims a "Glycemic Index of about 55 or less," the Product Alert does not even mention the Glycemic Index value of the Cinagro product.

Moreover, the present invention, as herein amended, has the further requirement that "the composition comprises from about 0.1% to about 10% of the total fructose, by weight of the composition." Again, the Product Alert does not even discuss the total fructose values of the product, much less teach the specific range of values claimed herein. The Examiner presumes that "because fruit juices are used and no mention of sucrose, glucose or maltose is mentioned, it is inherent that the Index is within Applicants' range." However, Applicants respectfully point out that inherency may not be established by probabilities or possibilities. The mere fact that a certain thing may result from a given set of circumstances is not sufficient. *In re Oelrich*, 666 F.2d 578, 581 (CCPA 1981).

Specifically, the present compositions require a Glycemic Index value of "about 55 or less" to realize the desired goals of the invention. In order to achieve this specific value, the compositions of the present invention need to further comprise "from about 0.1% to about 10% of the total fructose, by weight of the composition." It is this particular total fructose value that contributes to the present composition's low Glycemic Index value. The Examiner's assumption that the Cinagro product has the same Glycemic Index value as the present invention is improper. This fact cannot be assumed simply because the Cinagro product contains only agave nectar. The Product Alert does not specify how much agave nectar is present in the Cinagro product. If the Cinagro product contains more than 10% total fructose (in the form of agave nectar), by weight of the composition, it may have a higher Glycemic Index value than that stipulated in the present invention, thus, exceeding the scope of the present claims. Accordingly, it is improper to presume that the Cinagro product inherently has the same Glycemic Index value as the present invention. Therefore, for all of the foregoing reasons, Applicants respectfully assert that the Examiner has failed to establish the present invention is anticipated under 35 U.S.C. § 102, and respectfully request withdrawal of the rejection.

The Rejection under 35 U.S.C. § 103 (a)

The Examiner has rejected Claims 1-20 under 35 U.S.C. § 103 (a) as being obvious in view of Product Alert (v. 28, n. 11). For the following reasons, Applicants respectfully traverse this rejection.

The Examiner's generalization that, because the prior art arguably contains ingredients similar to the present invention, it is more than reasonable to assume that it also possesses similar Glycemic Index characteristics, does not meet the Examiner's burden of establishing a prima facie case of obviousness. To establish a prima facie case of obviousness under 35 U.S.C. §103, the Examiner must meet three basic criteria. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when

combined) must teach or suggest *all* the claim limitations. See, for example, *In re Vaeck*, 947 F.2d 488 (Fed. Cir. 1991). Applicants respectfully assert that the Office Action fails to establish the first and third criteria, and thus, fails to make a prima facie case of obviousness under 35 U.S.C. § 103.

First, Applicants respectfully assert that there is no suggestion or motivation, either in the reference itself or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or combine reference teachings. The mere fact that references can be combined or modified does not render the resultant combination obvious unless the prior art also suggests the desirability of the combination. See *In re Mills*, 916 F.2d 680 (Fed. Cir. 1990). Applicants respectfully assert that there is nothing in the prior art that suggests the desirability of modifying the reference to produce the compositions of the present invention. Indeed, the prior art fails to even discuss low Glycemic Index value compositions, produced by limiting the amount of total fructose in the composition, much less disclose the aforementioned surprising benefit associated therewith. Therefore, Applicants respectfully submit that the prior art does not suggest the desirability of the present composition, such that it would motivate one skilled in the art to modify the cited reference.

Second, the prior art reference, does not teach or suggest *all* of the claim limitations of the present invention, which teaches compositions for use as foods or beverages, comprising one or more flavanols, one or more bracers, and vitamin B, wherein the composition exhibits a Glycemic Index of about 55 or less, and wherein, as amended herein, the composition comprises from about 0.1% to about 10% of the total fructose, by weight of the composition. It is this particular combination that has surprisingly been found to produce compositions having a low Glycemic Index value that enhances the perceived positive mood and energy in the consumer, without rapid depletions of blood glucose, while reducing the insulin response. In contrast, the prior art fails to even teach a composition having a Glycemic Index of about 55 or less, much less disclose its relevance to the achievement of the surprising benefits.

Moreover, the prior art does not teach the particular amounts of the various ingredients required to produce the surprising benefits of the present invention. Specifically, the prior art fails to teach that, by combining the ingredients in the particular proportions indicated in the present claims, and limiting the total fructose in the composition, the perceived positive mood and energy in the consumer is enhanced without rapid depletions of blood glucose, while simultaneously reducing the insulin response. This surprising benefit can be attributed to the low Glycemic Index value exhibited by the present compositions, which results in part from the low total fructose content.

For example, in the present application, under the section entitled "Enhancement of Perceived Energy," the Applicants describe an analytical method wherein three compositions,

including the composition described herein, are tested for their effects on individuals' perceived energy. The test results clearly indicate that the low Glycemic Index value compositions of the present invention provide and / or maintain mental alertness better relative to the high Glycemic Index value compositions tested. Moreover, Examples 1 and 2 of the present application further support the notion that compositions having a low Glycemic Index value provide the perception of enhanced energy and alertness relative to high Glycemic Index value products. Because the prior art fails to specifically limit the total fructose of the compositions therein, and because the total fructose influences the Glycemic Index value of the composition, the Glycemic Index value claimed herein cannot be said to be taught in the prior art. Thus, the prior art cannot be said to teach *all* of the claim limitations of the present invention. Therefore, for both of these reasons, Applicants respectfully assert that the prior art does not teach all the claim limitations of the present invention.

Thus, Applicants respectfully assert that the present invention is not obvious in view of the cited prior art references. The present invention is directed to food and beverage composition, which possess a Glycemic Index of about 55 or less and contain particular amounts of various components. This particular combination, along with the specified amounts of each component, is not disclosed in the prior art, nor would the skilled artisan deduce this combination from the cited prior art reference. Moreover, this unique combination has surprisingly been found to enhance the perceived positive mood and energy in the consumer, without rapid depletions of blood glucose, while reducing the insulin response, as illustrated in the Examples provided in the present application. Therefore, the present invention is not obvious in light of the cited references, and the rejection under 35 U.S.C. § 103 should be withdrawn.

CONCLUSION

For all the foregoing reasons, Applicants respectfully request withdrawal of the objection to the Information Disclosure Statement, as well as the rejections under 35 U.S.C. §§ 112, 102 and 103.

Respectfully submitted,

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